No. 77-444

In the Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION CO., ET AL.,
APPELLANTS
v.
THE CITY OF NEW YORK, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

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INTEREST OF THE UNITED STATES

Congress has determined that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development * * *." National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. 470(b). More than 40 years ago, Congress "declared that it is a national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States." Historic Sites, Buildings, Objects, and Antiquities Act of 1935, 49 Stat. 666, 16 U.S.C. 461. Fed-

eral historic preservation programs are discussed more fully in the Appendix, *infra,* pp. 1a–9a. These efforts include assistance to state and local governments for the expansion and acceleration of their historic preservation programs and activities. From fiscal year 1971 through fiscal year 1977, more than $3.7 million in federal funds were distributed to New York State for historic preservation purposes. Of this sum, approxmately $640,000 was allocated to New York City. The United States thus has a substantial interest in state and local historic preservation endeavors.

The United States itself may both regulate private property for the public weal and take private property for a public use. See, *e.g., Mutual Loan Co.* v. *Martell,* 222 U.S. 225, 223; *Barbier* v. *Connolly,* 113 U.S. 27, 31; *Kohl* v. *United States,* 91 U.S. 367, 371–374; *Pollard's Lessee* v. *Hagan,* 3 How. 212, 222–223. In the latter instance, but not the former, the Taking Clause of the Fifth Amendment requires the United States to pay "just compensation" to the former owner of the condemned property. Because it may be called on to pay just compensation if a law designed as a regulation of uses is deemed to be a taking, the United States is interested in the proper relationship between regulations and takings.

QUESTION PRESENTED

Whether New York City's Landmarks Preservation Law, as applied to Grand Central Terminal, takes appellants' property without just compensation.

STATEMENT

Grand Central Terminal is located at the intersection of Park Avenue and 42d Street in the heart of midtown Manhattan. Grand Central is the hub of an extraordinarily busy and intricate transportation network, where commuter trains, long-distance trains, the New York City subway, private and public bus lines, and readily available taxicab service all meet. The completely submerged double-level track system at the Terminal permits the accommodation of large numbers of trains without loss of usable land area. The presence of the Terminal has enhanced the value of surrounding real estate and has contributed significantly to the emergence of Park Avenue as a prime residential district (J.S. App. 20a).

Grand Central Terminal has become one of New York's best-known buildings, a major attraction for visitors and residents alike (J.S. App. 47a). Constructed at the beginning of the twentieth century according to a plan selected in a nationwide architectural competition, the Terminal was formally opened to the public in 1913 (*ibid.*). It was immediately recognized as a triumph of comprehensive urban design, an ingenious solution to the problem of creating sufficient space for movement and interchange of passengers and freight in a city environment.[1]

[1] One contemporary critic praised the achievement in the following effusive terms:

"The Grand Central Terminal is not only a station; it is a monument, a civic center or, if one will, a city. Without exception, that part of it which is the station is not only the greatest head

(Continued)

Among the best-known features are the fine Beaux Arts facade, the monumental statuary group of Mercury, Hercules, and Minerva ranged around the clock on the 42d Street side of the Terminal, and the vast interior space of the Grand Concourse—125 feet high to the vaulted ceiling covered with constellations painted by the French artist Paul Helleu (A. 108–110; R. 2232–2238; Def. Exhs. D1–D5).

Appellant New York and Harlem Railroad Company ("NYHRR") owns Grand Central Terminal (A. 8). Appellant Penn Central Transportation Co., in turn, owns approximately 95 percent of the stock of NYHRR, and it has leased the Terminal from NYHRR for a 300-year term expiring in 2274 (A. 7–9). Penn Central also owns numerous neighboring properties in midtown Manhattan, including the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building and other office buildings along Park Avenue, and the Yale Club. See A. 94–97; *New Haven Inclusion Cases*, 399 U.S. 392, 438.

Penn Central is the product of a merger between the Pennsylvania and New York Central Railroads. That merger was approved by this Court in 1968. *Penn-Central Merger Cases*, 389 U.S. 486. For many decades New York City permitted only the Pennsylvania and New York Central Railroads to build and operate stations in New York. Josephson, *The Robber*

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station in the United States but the greatest station of any type not only on this continent but in the world." (Droege, *Passenger Terminals and Trains* 159 (1916).)

Barons 122, 182–183 (1962); Burgess, *Centennial History of the Pennsylvania Railroad Company* 266, 469 (1949). Some railroads shared the use of these facilities,[2] and others were simply denied direct access to the City.[3] Josephson, *supra* at 293; Burgess, *supra* at 463.

On August 2, 1967, Grand Central Terminal was designated a landmark, under New York City's Landmarks Preservation Law (J. S. App. 53a).[4] N.Y.C. Charter § 2004; N.Y.C. Administrative Code, Ch. 8–A, §§ 205–1.0 to 207–21.0 (McKinney's 1968) (reprinted in J.S. App. 76a–113a). Although Penn Central opposed the assignment of landmark status to the Terminal, it did

[2] The NYHRR and the New York, New Haven, and Hartford Railroad used Grand Central Terminal, while the Long Island Railroad used Pennsylvania Station. Josephson, *The Robber Barons* 122 (1962); Burgess, *Centennial History of the Pennsylvania Railroad Company* 524 (1949).

[3] The Lackawanna, Erie, Lehigh Valley, Jersey Central, Susquehanna, and Baltimore & Ohio were forced to terminate on the west side of the Hudson River. On several occasions, this Court has confronted the problems suffered by those railroads unable to secure the right to enter New York City. See, *e.g.*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 n. 9; *United States* v. *Baltimore & Ohio R.R.*, 231 U.S. 274; *United States* v. *Baltimore & Ohio R.R.*, 225 U.S. 306.

[4] The law was adopted in 1965, pursuant to the enabling provisions of New York State's Historic Preservation Act (formerly N.Y. Gen. City Law § 20(25–a) (McKinney's 1968), now N.Y. Gen. Mun. Law § 96–a (McKinney's Cum. Supp. 1977), enacted nine years earlier.

An 11-member Landmarks Preservation Commission, including at least three architects, one qualified historian, one realtor, and one city planner or landscape architect, may designate a particular structure a landmark if the Commission finds, after a public hearing, that the structure is at least 30 years old and that it possesses

(Continued)

not seek judicial review of the Landmarks Preservation Commission's assessment of the Terminal's historic and cultural significance.[5]

The designation of Grand Central Terminal as a landmark required Penn Central to keep the Terminal "in good repair" (Section 207–10.0(a)), and not to make any unauthorized alteration in the Terminal's exterior architectural features (Sections 207–5.0 to 207–9.0).

The designation also had implications under New York City's zoning law, which imposes floor area ratio (FAR) limitations on improvements in different districts. Because landmarks may not be altered in ways that destroy their historic value, classification of a particular structure as a landmark may preclude development of the landmark site to the full extent

(Continued)

"a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation * * *" (Sections 207–1.0(n) and 207–2.0(a)(1)). Designations are subject to disapproval or modification by the City Board of Estimate after the Board has considered a report by the City Planning Commission concerning the relationship of the landmark designation to "the master plan, the zoning resolution, projected public improvements and any plans for the renewal of the area involved" (Section 207–2.0(g)(1)). In this case, the Board of Estimate confirmed the landmark designation on September 21, 1967 (J.S. App. 3a).

[5] The Commission's report stated (R. 2240):

"Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts."

ordinarily permissible under the zoning law. To take account of this, New York City amended its Zoning Resolution in May 1968 to allow development rights to be transferred from a landmark site to adjacent lots.[6] Buildings on lots receiving such transferred rights were permitted to exceed the applicable FAR maximum by 20 percent, and they could do so either by being taller or by using more of the lot's area than otherwise permitted. In December 1969 the City broadened the group of lots to which development rights could be transferred from landmark sites in commercial districts such as that in which Grand Central Terminal is located.[7] For transfers from sites of this kind, the 1969 amendment also dropped the 20 percent limit on increases above the ordinarily permissible FAR. See N.Y.C. Zoning Resolution §§ 74–79 to 74–793 (McKinney's 1968) (reprinted in J.S. App. 113a–118a).[8]

[6] The term "adjacent lot" was defined as (J.S. App. 113a): "[A] lot which is contiguous to the lot occupied by the landmark building or one which is across a street and opposite to the lot occupied by the landmark building, or, in the case of a corner lot, one which fronts on the same street intersection as the lot occupied by the landmark building."

[7] In a qualifying commercial district, "adjacent lot" also includes (J.S. App. 113a–114a):

"A lot contiguous or one which is across a street and opposite to another lot or lots which except for the intervention of streets or street intersections from [*sic;* form] a series extending to the lot occupied by the landmark building. All such lots shall be in the same ownership * * *."

[8] For a participant's description of the history of the zoning amendments, see Marcus, *Air Rights Transfer in New York City*, 36 Law and Contemp. Prob. 372, 374–375 (1971).

Meanwhile, on January 22, 1968, nearly six months after the Terminal was designated a landmark, Penn Central entered into a lease and sub-lease arrangement with appellant UGP Properties, Inc., a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation. Under the agreement, UGP was to construct and operate a multi-story office building over the Terminal (J.S. App. 48a). UGP promised to pay Penn Central $1 million annually during construction and at least $3 million annually thereafter (*ibid.*). The term of the lease was 50 years, and UGP received an option to renew for an additional 25 years (J.S. App. 54a).

The first plan developed by appellants for the new office building entailed preservation of the Terminal's facade underneath a 56-story tower.[9] Appellants applied to the Commission for a certificate of "no exterior effect on protected architectural features." See J.S. App. 3a, 54a. Such an application requires the Commission to determine (J.S. App. 90a):

> (a) whether the proposed work would change, destroy or affect any exterior architectural feature of the improvement on a landmark site * * *, and (b) in the case of construction of a new improvement, whether such construction would affect or not be in harmony with the external appearance of other, neighboring improvements on such site * * *.

[9] In 1911, during construction of the Terminal, there was a plan to erect a 20-story office tower over the Terminal building. The plan was eventually discarded. The tower proposed in 1911 bears no resemblance to the architect's renderings of the modern skyscraper that Penn Central now wishes to build on the Terminal site. See *New York Times*, October 12, 1975, § 8, p. 8, col. 1.

Only if the Commission reaches negative answers to both inquiries may the certificate be granted, and only if the certificate is granted may the alterations be made (J.S. App. 90a–91a). The Commission denied appellants' application, after a hearing, on September 20, 1968 (J.S. App. 54a). Appellants did not seek judicial review of this decision (J.S. App. 3a–4a).

The architect engaged by appellants then produced a second design, which envisaged destroying large parts of Grand Central Terminal (J.S. App. 22a). Appellants applied to the Commission for a "certificate of appropriateness," which an owner must obtain under Section 207–6.0 of the Landmarks Preservation Law before destroying a landmark. Although they submitted both plans with their application, appellants regarded the second design as economically preferable (J.S. App. 48a).

In response to an application to alter the exterior of a landmark the Commission must determine "whether the proposed work would be appropriate for and consistent with the effectuation of the purposes" of the Preservation Law (J.S. App. 91a). Where demolition of a landmark is proposed, Section 207–6.0(d) directs the Commission to "consider the effects of the proposed work upon the protection, enhancement, perpetuation and use of the exterior architectural features of such landmark which cause it to possess a special character or special historical or aesthetic interest of value" (J.S. App. 93a). Em-

ploying these criteria, the Commission, after two public hearings, denied appellants' application (J.S. App. 3a).[10] Again, appellants did not seek judicial review of the Commission's decision (J.S. App. 3a–4a).

Instead, appellants initiated this lawsuit, challenging the constitutionality of the Landmarks Preservation law as applied to Grand Central Terminal. Appellants alleged that the designation of the Terminal as a landmark and the acompanying restrictions on the use of the Terminal's site constituted a taking of private property for public use without just compensation, in violation of the Fourteenth Amendment (A. 16–17). The Trial Term of the New York Supreme Court agreed, and it permanently enjoined the City and the Commission from preventing the construction of a building that would be lawful but for the Landmarks Law (J.S. App. 51a–73a). Although the reasons for the decision are not entirely clear, the court concluded that the Landmarks Law deprived Penn Central of substantial prospective rentals and stated (*id.* at 71a): "[S]urrounded as Grand Central is by the heavily travelled roadway around its perimeter on three sides, it leaves no reaction here other than that of long neglected faded beauty. The point of decision here is that the authorities empowered to make the designation may do so but only at the expense of those who will ultimately have to bear the cost, the taxpayers."

A divided panel of the Appellate Division of the Supreme Court reversed (J.S. App. 16a–50a). The majority reasoned that a regulation of uses of prop-

[10] Section 207–8.0(a) establishes a detailed procedure pursuant to which a certificate of appropriateness may be obtained for demolition or alteration of a landmark, if the applicant demonstrates that the landmark site as it stands is "not capable of earning a reasonable return." The term "reasonable return" is defined as "[a] net annual return of six per centum of the valuation of an improvement parcel [*e.g.*, a landmark site]" (Section 207–1.0 (v)). When an applicant has made a demonstration of insufficient return, the Commission must attempt to devise a plan whereby the landmark may be preserved, and "also rendered capable of earning a reasonable return" (Section 207–8.0(b)). Such a plan can include, *inter alia*, partial or complete tax exemptions, remission of taxes, or authorization of alteration, construction, or reconstruction that will preserve the special features of the landmark but at the same time improve the site's profitability. If tax adjustments alone cannot alleviate the landmark owner's difficulty, any plan devised by the Commission must be submitted for the applicant's approval. If the Commission fails to devise an acceptable plan, it may, within a ten-day period, "transmit to the mayor a written recommendation that the city acquire a specified appropriate protective interest in the improvement parcel * * *" (Section 207–8.0(g)). If no such recommendation is made, or if such a recommendation is made and the city does not follow it within 90 days, the Commission must issue the applicant a notice to proceed with the demolition or alteration originally proposed.

Because the site occupied by Grand Central Terminal already enjoys a partial real estate tax exemption under Section 489ff of the New York Real Property Tax Law, relating to commuter railroad real property, appellants could not invoke the procedure outlined above, by which property owners unable to earn a reasonable return on a landmark site may obtain relief under the Landmarks Preservation Law. In the New York courts, appellants tried to show that they were incapable of earning a reasonable return on the Terminal site, as long as that site was occupied by the Terminal alone. They were unsuccessful in this endeavor (J.S. App. 13a–14a, 25a–27a) and do not pursue it in this Court (Br. 8 n. 7). Accordingly, the unavailability of the procedure described in Section 207–8.0 of the Landmarks Preservation Law had no deleterious effect on appellants' financial position, because appellants would have been unable to demonstrate the economic hardship necessary to activate the relief provisions of the statute even if they had been eligible.

erty is a "taking" only if the regulation deprives the owner of all beneficial use of the property. It stressed that the designation of the Terminal as a landmark does not interfere with its intended and primary use as a railroad terminal (*id.* at 24a, 48a) and found that Penn Central had not demonstrated that the Terminal is incapable of earning a reasonable return (*id.* at 25a, 49a–50a). Penn Central's submissions were flawed, the court explained, because they did not include an imputed rental value for the Terminal's facilitation of railroad activities. "Since Penn Central is in the passenger railroad business it, of necessity, must have a terminal * * *. The reasonable rental value of such [terminal] space cannot properly be omitted from any meaningful analysis of the property's capacity to yield a reasonable return" (*id.* at 25a). Because Penn Central had not demonstrated that the Terminal would be unprofitable even with rental income imputed for this purpose,[11] the court held that it had not carried its burden of demonstrating a taking.

The New York Court of Appeals unanimously affirmed (J.S. App. 1a–15a). The court first reasoned that there had been no taking because the designation of the terminal as a landmark did not deprive the owners of a reasonable return from their property (*id.* at 2a–6a). Then, exploring further the problems caused by landmark preservation laws, the court stated that it would require landmark designations

[11] The court stated (J.S. App. 26a; emphasis added): "At best, [appellants] have shown that they have been deprived of the property's *most* profitable use."

to leave owners with a "reasonable return" only on the privately contributed component of the property's value, not on the portion created by the efforts of society (*id.* at 6a–9a). The court then observed that the return on the Terminal as a transportation hub included some fraction of the return on appellants' nearby real estate holdings because appellants' "hotels and office buildings, would lose considerable value and deprive [appellants] of much income, were the Terminal not in operation" (J.S. App. 9a). Finally, the court remarked that appellants "have not been wholly deprived of the development rights above the Terminal" (*id.* at 11a). These development rights have been made transferable, and the court thought that this feature of the City's program helped establish that appellants had been treated fairly (*id.* at 11a–14a).

SUMMARY OF ARGUMENT

In order to promote the general welfare, federal, state, and local governments may regulate the use of private property. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365. The scope of legislative discretion in this area is broad, and economic regulations enjoy a presumption of constitutionality. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15. Furthermore, historic preservation is a valid objective of governmental regulation. *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668; *City of New Orleans* v. *Dukes*, 427 U.S. 297, 304.

In purpose and effect, New York City's Landmarks Preservation Law is similar to common zoning ordi-

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nances that have been approved by this Court. *Village of Euclid* v. *Ambler Realty Co., supra; Goldblatt* v. *Town of Hempstead,* 369 U.S. 590. By its nature, historic preservation requires the identification and protection of individual sites and structures of unusual historic value. Accordingly, the fact that New York City's law has created a comprehensive program for the preservation of landmarks located not in a single district but at different places throughout the City does not mean that the law as applied to Grand Central Terminal is constitutionally infirm.

The unique features of Grand Central Terminal justify its designation as an historic landmark. Appellants concede this point. The designation permits continued use of the Terminal as a railroad station, the function it has served since its opening in 1913. New York City's action thus does not deprive appellants' property of all reasonable beneficial use. Moreover, the state courts have found that appellants have not demonstrated their inability to earn a reasonable return on their investment in the Terminal (J.S. App. 25a–26a, 49a–50a). Appellants accept this finding as well (Br. 8 n. 7). That should be dispositive. Under the principles established in *Goldblatt* v. *Town of Hempstead, supra,* a land use regulation that serves a substantial public purpose and allows a reasonable use of property is valid.

Appellants' claim that New York City has completely taken the "air rights" above Grand Central Terminal is unpersuasive. Almost any regulation of uses may be characterized either as a partial taking

of an entire piece of property or a complete taking of part of that property. Appellants' verbal manipulation does not distinguish this case from earlier decisions in which this Court sustained regulations that totally prohibited industrial uses (*Village of Euclid* v. *Ambler Realty Co., supra*), excavation below a certain level (*Goldblatt* v. *Town of Hempstead, supra*), and building above a specified height (*Hudson County Water Co.* v. *McCarter,* 209 U.S. 349).

ARGUMENT

NEW YORK CITY'S LANDMARKS PRESERVATION LAW DOES NOT "TAKE" GRAND CENTRAL TERMINAL WITHOUT JUST COMPENSATION

A. A REGULATION OF USES IS NOT A TAKING UNLESS IT DEPRIVES THE PROPERTY OF ANY REASONABLE USE

1. In order to promote the general welfare, federal, state, and local governments may regulate the use of private property. *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590. The discretion accorded to legislative bodies is broad, and it is "well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15. Use restrictions are constitutional unless they do not "bear a substantial relation to the public health, safety, morals, or general welfare." *Nectow* v. *City of Cambridge,* 277 U.S. 183, 188. And

"the general welfare is not to be narrowly understood; it embraces a broad range of governmental purposes." *Moore* v. *City of East Cleveland, Ohio,* 431 U.S. 494, 498 n. 6 (plurality opinion).[12]

One of the legitimate concerns of governmental regulation is historic preservation. Appellants concede as much (Br. 12), and this Court has acknowledged that governments may pursue historic, aesthetic, and cultural objectives. See *United States* v. *Gettysburg Electric Ry.,* 160 U.S. 668; *Berman* v. *Parker,* 348 U.S. 26, 31–33; *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 9; *City of New Orleans* v. *Dukes,* 427 U.S. 297, 304. Historic preservation laws have been enacted by all 50 states and by more than 500 municipalities.[13] National Trust for Historic Preservation, *A Guide to State Historic Preservation Programs* (1976). State and lower federal courts have uniformly held that historic preservation is an appropriate goal of land use regulation, although in some instances particular applications of state or local laws have not survived judicial scrutiny. See the cases cited in Appellees' Br. 11 and in National Trust for Historic Preservation Br. 22 n. 29.

Appellants do not now question the designation of Grand Central Terminal as an historic landmark. Appellants expressed some doubts on this score in their complaint (A. 13), but they have abandoned any contention that the decision to classify the Terminal as a landmark was improper. Appellants did not seek

[12] See also *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 73–82 (Powell, J., concurring).

[13] See also the Appendix, *infra,* pp. 1a–9a.

judicial review of the designation when it was made in 1967, and the determination of the New York City Landmarks Preservation Commission was entirely justified.[14] Indeed, on January 17, 1975, Grand Central Terminal was entered in the National Register of Historic Places and was designated a national historic landmark. 41 Fed. Reg. 5914, 5989.

2. The law at issue in this case establishes a comprehensive citywide program for the identification

[14] The design and execution of Grand Central have won extensive acclaim (see notes 1 and 5, *supra*), and the consensus of the critics is that the Terminal's place in the architectural history of New York City is assured. In a review of a pictorial exhibition that featured Grand Central Terminal, the Fifth Avenue Library, and the original version of the Times Tower, the architectural critic of the *New York Times* wrote:

"All three buildings straddle the 19th and 20th centuries. They are all examples of progressive planning and formal, academic style. And all profoundly affected the character and development of their surroundings. Together * * * they are responsible to a large degree for the form and content of midtown Manhattan. And they have continued to serve practical and symbolic purposes well into our own time. They are, in fact, much more than buildings; these three are New York icons, touchstones of its identity, generators of function and legend, a part of the city's soul.

* * * * *

"When the Terminal was built, between 1898 and 1913, it * * * was the result of consolidated growth and a grand civic gesture. The brilliantly functional, intricately related, multi-level plan, with the Terminal built over the tracks, was connected by pedestrian routes and 'circumferential drives' to the circulation of the area and the large-scale development around the station. It is one of the most stunning achievements in the history of urban design.

"Ramps, passageways, subways, shops, services and offices all converge on one of the greatest interior spaces of [New York] or any other city, the Grand Concourse—125 feet high to its star-studded, once blue, vaulted ceiling." *New York Times,* October 19, 1975, § 2, p. 32, col. 1.

and preservation of historic structures.[15] The statute's purposes and effects are quite like those of common zoning ordinances that are unquestionably permissible. See *Village of Euclid* v. *Ambler Realty Co., supra; Goldblatt* v. *Town of Hempstead, supra.* Zoning ordinances typically are designed to improve the quality of life by concentrating certain kinds of enterprises in limited areas and separating incompatible land uses. In recognition of the fact that New York City's Landmarks Preservation Law does not move historic structures and gather them in a particular area of the City, the New York Court of Appeals acknowledged that this case does not involve zoning in the usual sense (J. S. App. 4a). Nevertheless, for purposes of the constitutional issue presented here, the zoning analogy is apt.

The point of New York City's law and of the federal statutes (Appendix, *infra,* pp. 1A–9A) is that some properties, wherever located, deserve special treatment in order to preserve and improve the quality of life in the City as a whole. This effect on the quality of life may be present whether a number of such buildings are located together in a single historic district (see, *e.g., Maher* v. *City of New Orleans,* 516 F. 2d 1051 (C.A. 5), certiorari denied, 426 U.S. 905) or are dispersed throughout a city, state, or nation.

[15] By November 1977 more than 400 historic structures in all of New York's five boroughs had been designated by the City's Landmarks Preservation Commission. Landmarks Preservation Commission of the City of New York, *Landmarks and Historic Districts* (1977).

Although the designation of particular buildings as landmarks may create opportunities for arbitrariness not present in broad-area zoning, by the opportunity to challenge a determination that a particular structure or group of structures has special historic or architectural value is an effective safeguard against arbitrary government action. Appellants did not challenge the designation of Grand Central Terminal as a landmark, and so they are in no position to argue that they were injured by arbitrary or unprincipled action. The decision that the Terminal is a landmark would be unassailable in any event. It is, as the court of appeals said, "no ordinary landmark" (J.S. App. 7a).

3. Under the principles established in *Goldblatt* v. *Town of Hempstead, supra,* once it has been established that a regulation serves a substantial public purpose, the only open question is whether the regulation obliterates any beneficial use of the property. Appellants do not raise the beneficial use question here and could not reasonably do so. The landmark designation does not affect the use Grand Central Terminal has had since its inception. It was, and will continue to be, a railroad terminal containing office space and concessions (J.S. App. 24a, 48a). The designation of the Terminal as a landmark *changes* nothing; it means only that appellants are inhibited from making alterations to the exterior of the building.

Moreover, the state courts found as a fact that appellants had not demonstrated that they are unable to earn a reasonable return on their investment in the

Terminal (J.S. App. 25a–26a, 49a–50a). Appellants accept that finding (Br. 8 n. 7) and do not challenge the conclusion that they have the burden to demonstrate that the designation deprives them of a reasonable return.[16] That should be the end of this case.

Appellants contend, however, that the value of property depends on the return it can bring, and that state action reducing the return (here the yearly rentals) must to that extent deprive the property of its reasonable return. The contention is circular.[17] Whether or not it is possible to devise talismanic definitions of reasonable return and reasonable beneficial use of property, the appropriate disposition of an argument that a regulation amounts to a taking must depend more on the social and economic realities of a particular situation than on any analysis of words and phrases. Certainly the fact that appellants may receive a reasonable return on their net investment in

[16] This burden follows directly from the presumption of constitutionality afforded to legislative and administrative acts. See, *e.g.*, *Usery* v. *Turner Elkhorn Mining Co. supra*, 428 U.S. at 15.

[17] See generally *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 601: "The heart of the matter is that [the measure of reasonable return] cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated." Consequently, the Court held, a regulated supplier of gas is entitled to a fair return only on investment, not on "value" abstractly computed. The same principle applies here.

the Terminal is a strong point in favor of the law's validity.[18]

[18] Appellants have concentrated a major segment of their attack (Br. 16–19) on the aspect of the New York Court of Appeals' decision that suggests that, in calculating the value of the property on which appellants are entitled to earn a reasonable return, the publicly created component of the property's worth must be excluded. In *United States* v. *Fuller*, 409 U.S. 488, 492, this Court acknowledged that, at least in some circumstances, "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created * * *."

Appellant railroads have benefited to a notable extent from public largesse in connection with Grand Central Terminal. Most important, New York City's decision to permit the placement of a station and tracks under public streets in midtown Manhattan has enabled the Terminal to flourish and has greatly enhanced the value of Penn Central's surrounding properties. Appellants argue that virtually any piece of property derives a significant portion of its value from its place within the social order and that therefore the New York Court of Appeals erred in attempting to remove from consideration that fraction of the Terminal's value attributable to the efforts of society at large.

We, too, believe that it would be pointless in most cases to attempt to separate the value of property contributed privately from the value added by the benefits of living in society; property has value only in relation to its surroundings and the legal rules for enforcing private rights. Moreover, some of the public contributions to the Terminal may best be understood as subsidies in exchange for railroad services that otherwise would not have been provided (or would have been provided only at higher rates). To the extent this was true, the largesse bestowed on Grand Central Terminal has inured to the benefit of the public, not of appellants; the public contributions are the equivalent of "payment" to appellants for benefits appellants distributed to the public, and it is too late for the City to "take back" its contributions by disregarding them in determining the value of the Terminal on which appellants are entitled to a reasonable return.

Still, there are present public benefits (such as tax exemptions) that must be considered in determining whether the net effect of

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The observation is now commonplace that many of the familiar terms of property law are less than helpful. Cases where courts have been asked to decide whether governmental action has effected a "taking" of private property have generated more than their share of linguistic rather than functional analysis.[19]

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the City's dealings with appellants amounts to a taking. It is not necessary to embrace fully the approach of the New York court in order to sustain its result. The simple fact is that the state courts found that appellants did not prove they could not earn a reasonable return if they continued to operate the Terminal as a train station only, without the proposed office building, and appellants do not contest that finding.

[19] Compare, *e.g.*, Mr. Justice Holmes' opinion for the Court and Mr. Justice Brandeis' dissenting opinion in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393. The Court reviewed a state statute forbidding the mining of coal in such a manner as to cause the subsidence of any structure used as a human habitation. The Court held that the law resulted in a taking of private property. The majority opinion stated (260 U.S. at 413, 415–416):

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits * * *. So the question depends upon the particular facts. * * *

* * * * *

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * [T]his is a question of degree—and therefore cannot be disposed of by general propositions."

Mr. Justice Brandeis responded (*id.* at 417):

"Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in

Courts and commentators have identified a variety of factors that appear to have special significance. There is more likely to be a "taking" if an actual physical invasion of property has occurred, because that *transfers* the use of property from one person to another. Compare, *e.g.*, *United States* v. *Causby*, 328 U.S. 256, and *Griggs* v. *Allegheny County*, 369 U.S. 84, with *Batten* v. *United States*, 306 F. 2d 580 (C.A. 10), certiorari denied, 371 U.S. 955 (compensability of diminution in property value depends on whether aircraft causing harm fly over or only alongside affected property). Appellants rely on *Causby* and *Griggs*, but there was no transfer or invasion here.[20]

question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public."

See also Mr. Justice Frankfurter's declaration for the Court in *United States* v. *Dickinson*, 331 U.S. 745, 748:

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

This formulation begs the question of when "a servitude has been acquired."

[20] See also *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F. 2d 646, 678–679 (C.A. 1): "The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. * * * [N]o taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. * * * Three situations must be distinguished. First, a particular use of a parcel of property may be regulated or forbidden. Second, all uses of a parcel may be forbidden. Third, a right to use or burden property in a particular way may be transferred from the original owner to another person, or to a

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The takings cases present difficult judgmental problems because almost any governmental regulation that arguably diminishes a property's value may be characterized with equal accuracy as a partial taking of the entire property, or a complete taking of part of the property. And even if the two could be distinguished it would be hard to understand why different compensation rules should apply. It is perhaps enough to say that taking cases must be decided according to a rough concept of fairness, where a "fair" outcome is one produced by a rule that gives appropriate recognition to both personal economic needs and the interests of society. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1219, 1226 (1967). Finer tuning, Professor Michelman suggests, can be achieved only through legislation.

The New York City Landmarks Preservation Law is just such a legislative attempt to provide additional assurances of fairness to affected property owners. It guarantees a reasonable rate of return on properties designated as historic landmarks, except where such properties already enjoy certain kinds of tax exemptions.[21] It establishes detailed procedures to harmonize

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governmental body. Only the second and third situations are thought of as takings today."

[21] The requirement that just compensation be paid for a taking often serves (i) to protect a person from conscription of his assets in an unfairly high ratio for the benefit of the public at large, and (ii) to compel the government to make an informed choice whether the goal it seeks to pursue is worth as much to the public as the value of the property it must use or burden to achieve that goal and, if so, to induce the government to use the lowest-valued property that will enable it to achieve the public ends. Compare Posner, *Economic Analysis of Law* 40–44 (2d ed. 1977), with Ackerman, *Private Property and the Constitution* 113–167 (1977). But these foundations are substantially eroded, when applied to general regulatory programs, by the recognition that taxes and other governmental programs legitimately may redistribute income from some persons to others, even if the onus falls on a relatively small group and the benefits are spread quite widely. It may be helpful, therefore, to think of the landmark preservation program as a non-monetary tax levied on owners of landmarks for the benefit of the general public (including owners in that capacity). A "landmark tax" levied in mony would be no more offensive to principles of equity than the thousands of other special purpose taxes. If a monetary landmark tax would be permissible, a non-monetary tax also should be; this suggests that there is nothing infirm in the City's program.

historic preservation needs and the desire of landmark owners to alter their property. In sum, the City's program as applied to Grand Central Terminal is a reasonable land use regulation directed toward a permissible governmental objective, and therefore it is not a taking for which the Fourteenth Amendment requires that just compensation be paid.[22]

[22] Although New York's landmarks law would be valid without further adornment, the City has chosen to modify its concededly valid zoning resolution in order to permit owners to achieve some additional benefit from the fact that a particular parcel has been designated as a landmark. Zoning amendments have been adopted allowing the utilization of development rights ordinarily available on the Terminal site on other nearby sites, several of which are owned by Penn Central (see pp. 4, 6–7, *supra*). This is precisely the sort of legislative fine tuning envisaged by Professor Michelman as a rational response to the problems created by the need for effective land use regulation. For additional examples of legislative efforts to provide some redress for property "deprivations" that the courts would deem noncompensable, see, *e.g.*, the Uniform Relocation Assistance Act of 1970, 84 Stat. 1894, 42

(Continued)

B. THE REASONABLE USE CRITERION PERTAINS TO THE PARCEL OF PROPERTY AS A WHOLE AND NOT TO EACH ONE OF THE BUNDLE OF PROPERTY RIGHTS

It may be that appellants agree with most of what has been said above. They argue, however, that the designation of the Terminal as a landmark "took"

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U.S.C. 4601 *et seq.*, and the highway relocation assistance provisions contained in Section 30 of the Federal-Aid Highway Act of 1968, 82 Stat. 830, 23 U.S.C. 501 *et seq.*

We think that the transferable development rights under the City's law are best seen not as "compensation" for a "taking" but as a reasonable measure to ensure that development rights customarily associated with a parcel of property are not taken at all. To be sure, the City's program places substantial restrictions on the use of the rights, but, for the reasons discussed in the text, rules that make property difficult to use, or that substantially diminish its value, are not necessarily takings. Appellants' argument that the transferable development rights are not "just compensation" for a "taking" of the development rights over the Terminal thus misses the mark.

If the transferable development rights are seen as "compensation" rather than as a measure of what was not taken, they would not be inadequate merely because they are not money. "[C]onsideration other than cash—for example, any special benefits to a property owner's remaining properties—may be counted in the determination of just compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150–151; footnote omitted. See also *Bauman* v. *Ross*, 167 U.S. 548. Appellants' argument that *no* quantity of transferable development rights could satisfy the requirement of just compensation therefore is incorrect. (The *Regional Rail* cases upheld the constitutionality of the Regional Rail Reorganization Act of 1973, 87 Stat. 986, as amended, 45 U.S.C. (Supp. V) 701 *et seq.* Valuation proceedings under the Act, in which appellant Penn Central is a party, are now pending. Issues regarding the form of payment may arise in those proceedings, and the United States urges this Court to avoid any statement in this case that might have unintended consequences in the Rail Act proceedings.)

all of the "air rights" above the building. Thus, they say, the designation did not simply restrict the uses of the property or require the property to be devoted to a lower-valued use; the designation took the air rights altogether, prohibiting any gainful use of them.[23]

This argument glides over the intractable problem of separating a partial taking of the whole from the whole taking of a part. See page 24, *supra*. It is no more accurate to say that the landmark designation took all of the air rights, leaving no gainful use of them, than it is to say that the designation took only a few of many gainful uses of the entire parcel, leaving the dominant gainful use of the parcel as a railroad terminal unaffected. Both statements are true. Any regulation can be characterized as a "total" taking of the thing prohibited.

So, here, the effect of the landmark designation is totally to prohibit the use of the air space over the Terminal, which itself rises more than 200 feet above ground level. In *Village of Euclid* v. *Ambler Realty Co., supra,* the zoning ordinance totally prohibited use of the property for industrial purposes, decreasing the value of the land by approximately 75 percent. In *Goldblatt* v. *Town of Hempstead, supra,* the town's ordinance prohibited excavation below the water table, completely depriving the owners of the right

[23] This characterization by appellants is not entirely accurate, because the development rights were made transferable. See note 22, *supra*. We need not rely here, however, on the transferability of the development rights.

to continue using the land as a sand and gravel pit. Courts consistently have sustained "setback" statutes, which prohibit an owner from building out to the borders of his land.[24] And there never has been a serious constitutional question about the validity of maximum building height regulations. As the Court stated in *Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355: "[T]he police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."[25]

It is therefore unavailing to attempt to carve up a parcel of property into discrete "rights" and to attempt to determine whether one of those rights has been "totally" taken by the regulation. We know

[24] See, *e.g.*, *Headley* v. *City of Rochester*, 272 N.Y. 197, 5 N.E. 2d 198; *State ex rel. Miller* v. *Manders*, 2 Wis. 2d 365, 86 N.W. 2d 469.

[25] The Court also said, in a passage that has been repeated many times (209 U.S. at 355): "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula * * *."

from decided cases that regulations may, without compensation, prevent buildings or other activities from going up (*Hudson County*), down (*Goldblatt*) or out (the setback cases). Each of these cases involved a complete restriction on some, but not all, of the bundle of rights associated with a parcel of property. And in each the question was the same: was what was left enough to permit reasonable, beneficial use of the property?

In the present case appellants have not challenged the finding of fact that there are reasonable, beneficial uses for the Terminal. And they have not even been deprived "totally" of the air rights over the land. They overlook the fact that the Terminal itself is many stories high. They have been "deprived" only of the right to go higher. But every height limitation takes away the right to go higher, as the regulation in *Goldblatt* took away the right to go lower. It is impossible to accept appellants' attempt to focus attention on the particular inhibitions worked by the regulation without overruling *Euclid* itself.

This attention to the uses of the entire bundle of rights is consistent with the decisions in regulated industry cases that the regulated entity need not be allowed to earn a reasonable return on every component of investment; it is enough if the entity receives a reasonable return on the investment taken as a whole. So, for example, in *Atlantic Coast Line R.R. Co.* v. *North Carolina Corporation Commission,* 206 U.S. 1, the Court upheld against constitutional challenge

an order to a railroad to run an additional train at a loss, concluding that calculations of gain and loss, and of reasonable return, must be made with respect to "the nature and productiveness of the corporate business as a whole" (206 U.S. at 27). And the result was the same when a utility sought to abandon an unprofitable service; the Court held that abandonment need not be permitted as long as the company was earning an adequate return on its total investment. *Puget Sound Traction, Light & Power Co.* v. *Reynolds,* 244 U.S. 574.[26]

We do not suggest that the City can take appellants' property without just compensation simply because appellants still may be earning a profit. Although that is the teaching of the rate regulation and abandonment cases, it cannot apply with full force when the owner is not subject to a unified system of regulation. The Penn Central, although subject to both state and

[26] Similar examples are legion. See, *e.g., Southern R. Co.* v. *North Carolina*, 376 U.S. 93; *Broad River Power Co.* v. *South Carolina ex rel. Daniel*, 281 U.S. 537, on rehearing, 282 U.S. 187; *Colorado* v. *United States*, 271 U.S. 153; *Western & Atlantic R.R.* v. *Georgia Public Service Commission*, 267 U.S. 493; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission*, 242 U.S. 603; *New York and Queens Gas Co.* v. *McCall*, 245 U.S. 345; *Northwestern Pacific R.R. Co.* v. *United States*, 228 F. Supp. 690 (N.D. Cal.), affirmed, 379 U.S. 132. Only the recognition that the return to the enterprise as a whole is what counts allows regulatory commissions to require regulated enterprises to engage in cross-subsidization—the reduction of prices to some customers and for some services (so that they may be encouraged) offset by increases elsewhere. Cross-subsidization is a characteristic feature of modern regulation. See generally Posner, *Taxation by Regulation*, 2 Bell J. of Econ. & Mgt. Sci. 22 (1971).

federal regulation in many ways, is not "regulated" by the Landmarks Commission. But these cases indicate that investments and property rights cannot easily be carved up for "takings" purposes, and they reinforce the submission that, as long as the Terminal still earns a reasonable return when put to its intended use, the argument that some discrete part of the original bundle of rights has been made worthless is immaterial.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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MARCH 1978.

APPENDIX

Federal Programs To Preserve Historic Sites and Structures

Congress has enacted a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance. They fall into three categories: (1) regulation of government-owned landmarks and historic places; (2) imposition of a requirement that historic preservation values be considered in the planning and performance of activities conducted under federal auspices; and (3) active participation in efforts intended to assist historic preservation.[1]

The first kind of provision, by definition, does not take private property. The leading statute of this sort demonstrates that congressional concern for historic preservation is not of recent vintage. The Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. 431–433, authorizes the President to designate historic landmarks, historic structures, and other objects of historic interest situated upon lands owned or controlled by the government as national monuments. The statute also made it a misdemeanor to appropriate, injure or destroy any historic or prehistoric ruin or monument on federal lands.

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[1] For a useful review of federal historic preservation legislation see Gray, *The Response of Federal Legislation to Historic Preservation*, 36 Law and Contemp. Prob. 314 (1971).

The second variety of federal statutes requires historic preservation to be considered in assessing the merits of proposed federal programs and in choosing a method of implementation once such programs have been adopted. For example, in the National Environmental Policy Act of 1969 ("NEPA"), 83 Stat. 852, 42 U.S.C. 4331(b)(4), Congress declared that "it is the continuing responsibility of the Federal Government to use all practicable means * * * to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may * * * preserve important historic, cultural, and natural aspects of our national heritage." Federal officials thus must consider potential effect on historic resources in connection with major federal actions. See 42 U.S.C. 4332. The Urban Mass Transportation Act of 1964 contains a similar provision. 78 Stat. 308, as amended, 49 U.S.C. 1610.

Other statutes are more specific. The Department of Transportation Act, 80 Stat. 933, as amended, 49 U.S.C. 1653(f), provides that the Secretary of Transportation "shall not approve any program or project which requires the use of * * * any land from an historic site of national, State, or local significance as so determined by [the appropriate Federal, State, or local officials] unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such * * * historic site resulting from such use." See also 23 U.S.C. 138.

An additional illustration of the second type of federal statute dealing with historic preservation is Section 102(a)(1) of the Public Buildings Cooperative Use Act of 1976, Pub. L. 94–541, 90 Stat. 205, to be codified at 40 U.S.C. (1976 ed.) 601(a)(1). Under that

provision, the Administrator of General Services, in managing and acquiring space for federal agencies, must "acquire and utilize space in suitable buildings of historic architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives."

The third group of federal laws includes those statutes that authorize federal acquisition of historic sites and promotion of historic preservation efforts initiated outside the federal government. Three of these statutes together form the basis for a comprehensive and cooperative system of identification and protection of historic resources.

The Historic Sites, Buildings and Antiquities Act of 1935, 49 Stat. 666, as amended, 16 U.S.C. 461–467, requires the Secretary of the Interior to "[m]ake a survey of historic * * * sites, buildings, and objects for the purpose of determining which possess exceptional value as commemoratory or illustrating the history of the United States" (16 U.S.C. 462(b)). The Secretary was further charged with the task of restoring, preserving, and maintaining such properties, either through acquisitions in the name of the United States (16 U.S.C. 462(d)) or through cooperative arrangements with states, municipalities, corporations, associations, and individuals (16 U.S.C. 462(e)). The Secretary has designated more than 1,500 national historic landmarks. See 43 Fed. Reg. 5162–5336.

In order to facilitate public participation in historic preservation, Congress created the National Trust for Historic Preservation in 1949 (63 Stat. 927, as amended, 16 U.S.C. 468–468d.). The National Trust is a charitable, educational, non-profit corporation, established to receive donations of historically significant properties, to preserve and administer

these properties, and to accept gifts for use in carrying out the preservation program. The nine-member Board of Trustees includes the Attorney General, the Secretary of the Interior, and the Director of the National Gallery of Art (16 U.S.C. 468b). The National Trust has more than 121,000 contributing members, including approximately 1,500 local and regional organizations involved in historic preservation. National Trust for Historic Preservation Br. 2.

The National Historic Preservation Act of 1966, 80 Stat. 915, as amended and added, 16 U.S.C. (1976 ed.) 470–470t, is the most important of the federal statutes. Congress determined that desirable historic preservation could be achieved only through new federal programs that complement private initiative and the efforts of state and local governments (16 U.S.C. 470(d)). See H.R. Rep. No. 1916, 89th Cong., 2d Sess. 6 (1966):

> Notwithstanding the progress which has been made with regard to historic preservation, most existing Federal programs and criteria for preservation are limited to natural and historical properties determined to be "nationally significant." Only a limited number of properties meet this standard. Many others which are worthy of protection because of their historical, architectural, or cultural significance at the community, State or regional level have little protection given to them against the force of the wrecking ball. Some of them are not even known outside of a small circle of specialists. It is important that they be brought to light and that attention be focused on their significance whenever proposals are made in, for instance, the urban renewal field or the public roads program or for the construction of Federal projects or of projects under Federal license that may involve their destruction. Only thus can a

> meaningful balance be struck between preservation of these important elements of our heritage and new construction to meet the needs of our ever-growing communities and cities.

Congress authorized the Secretary of the Interior to maintain an expanded "national register of districts, sites, buildings, structures, and objects significant in American history," and to grant funds to states for the preparation of comprehensive statewide historic surveys and plans for the preservation of historic properties (16 U.S.C. 470a(a)(1)). The statute also authorizes the Secretary to establish programs of matching grants-in-aid to the states and to the National Trust for Historic Preservation. These grants may be awarded to states only for preservation projects developed in accordance with a comprehensive statewide historic preservation plan approved by the Secretary (16 U.S.C. 470b(a)(2)). Approximately 15,000 properties are listed on the National Register of Historic Places.[2] Approximately 1,400 of these are historic districts; the remainder are individual properties.[3]

The 1966 Act also created the Advisory Council on Historic Preservation (16 U.S.C. 470i). The Council advises the President and Congress on historic preservation, recommends measures to coordinate historic

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[2] The complete National Register of Historic Places, as of December 31, 1977, appears at 43 Fed. Reg. 5162–5336.

[3] Most properties are entered in the National Register on the basis of nominations by a state. The nominating procedures are published in 36 C.F.R. Part 60. A state nominating a private property for listing in the National Register must notify the property owner of the nomination and allow a reasonable opportunity for written comment. The notification must inform the property owner of the federal tax consequences that may result from listing in the Register (see pp. 6A–7A, *infra*).

preservation activities, consults with state and local governments in the drafting of historic preservation legislation, and assesses the effects of tax policies on the achievement of historic preservation goals. The Council must be afforded an opportunity to comment on any federally funded or federally licensed undertaking that may affect a property included in or eligible for inclusion in the National Register. 16 U.S.C. 470f; see also Executive Order 11593, 36 Fed. Reg. 8921.[4]

Several more specific statutes encourage historic preservation. Foremost among these are four sections added to the Internal Revenue Code by the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520. Section 191 of the Code (26 U.S.C.), offers an accelerated depreciation deduction for amounts expended in the rehabilitation of historic structures. Such improvements may be amortized over a five-year period, even if their useful life is considerably longer. Similarly, Section 167(o) allows a person who acquires and substantially rehabilitates historic property to depreciate that property on an accelerated basis, even though, ordinarily, a new owner of used nonresidential property must calculate depreciation according to the straight-line method.[5]

While Sections 191 and 167(o) provide incentives for rehabilitation, Sections 280B and 167(n) discour-

[4] The Council's procedures governing the required agency consultation on proposed federal actions are published as 36 C.F.R. Part 800.

[5] "Substantially rehabilitated" property is property for which the capital expenditures incurred during the 24 months ending on the last day of the taxable year, decreased by allowable depreciation or amortization, exceed the greater of $5,000 or the adjusted basis of the property.

age demolition of historic structures. Under Section 280B(a)(1), no otherwise allowable deduction is permitted for amounts expended for such demolition, for the remaining undepreciated basis of the demolished structure, or for other resulting losses. Deductions thus denied may not be included in the depreciable basis of any replacement building; they must be charged to the capital account of the land on which the demolished structure was located. See 26 U.S.C. 280B(a)(2); S. Rep. No. 94–1236 (H.R. Rep. No. 94–1515), 94th Cong., 2d Sess. 504 (1976). Section 167(n) forbids the use of accelerated depreciation methods for new buildings erected on sites formerly occupied by historic structures.[6]

Under federal housing laws, as amended by the Model Cities Act of 1966, 80 Stat. 1278–1281, historic and architectural preservation should be considered in the development of urban renewal plans, and federally funded urban renewal projects may include the restoration of properties of historic or architectural value and the relocation of structures that will be restored and maintained for historic purposes. See 42 U.S.C. 1460(b), (c)(9)–(10). The Secretary of Housing and Urban Development is authorized to make grants to assist local governments in conducting surveys of the historic sites and structures in their areas. 40 U.S.C. 460(i). The Secretary also may award federal funds to state and local bodies for the acquisition and development of urban land that has value for historic, architectural, or scenic purposes. 42 U.S.C. 1500a(a), 1500d–1. And, under the 1974 amendments to the National Housing Act, 88 Stat.

[6] See generally Note, *State and Federal Tax Incentives for Historic Preservation*, 46 U. Cin. L. Rev. 833, 835–839 (1977).

1366, the Secretary is empowered to insure loans issued for the purpose of financing the preservation of historic structures. 12 U.S.C. 1703(a).

The Amtrak Improvement Act of 1974, 88 Stat. 1533, 49 U.S.C. (Supp. V) 1653(i), directs the Secretary of Transportation to provide financial, technical, and advisory assistance for preserving railroad passenger terminals and converting them into intermodal transportation facilities or civic and cultural activities centers. In distributing federal aid under this statute, the Secretary is to accord a preference to railroad terminals listed on the National Register of Historic Places or recommended by the Advisory Council on Historic Preservation. The United States may pay 60 percent of the total cost of a terminal preservation project covered by the Act.

The Historical and Archeological Preservation Act of 1974, 88 Stat. 174, as amended, 16 U.S.C. (1976 ed.) 469–469c, establishes a procedure for the preservation of historical or archeological data, the continued existence of which is threatened by a federally funded or licensed construction project. The statute authorizes the Secretary of the Interior to conduct survey, recovery, and protective operations on nonfederal lands, with the consent of all parties having a legal interest in the property involved. If he undertakes such measures, the Secretary must compensate any party damaged as the result of construction delays or temporary loss of land use.

Congress has prohibited new surface coal mining operations that "will adversely affect any publicly owned park or places included in the National Register of Historic Sites [*sic*] unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the

historic site." Pub. L. No. 95–87, Section 522(e)(3), 91 Stat. 509, to be codified at 30 U.S.C. (1972 ed.) 1272. This statute, the Surface Mining Control and Reclamation Act of 1977, also allows some surface areas to be designated as unsuitable for certain types of surface coal mining operations if those operations could affect historic lands and "result in significant damage to important historic * * * values" (Pub. L. 95–87, 91 Stat. 507–508).

Finally, if the Secretary of the Interior finds that surface mining activity may harm an historical landmark, he must notify the person conducting such activity and submit to the Advisory Council on Historic Preservation a report and a request for advice on ways in which to abate the activity or mitigate its impact. Pub. L. 94–429, 90 Stat. 1343, 16 U.S.C. (1976 ed.) 1908(a). By September 1978 the Council must submit to Congress a report on the actual or potential effects of surface mining on natural and historical landmarks and recommendations for appropriate protective legislation. 16 U.S.C. (1976 ed.) 1908(b).

U.S. GOVERNMENT PRINTING OFFICE: 1978